

P78511-94195

MONTANA EIGHTH JUDICIAL DISTRICT COURT, CASCADE COUNTY

.....

KAREN SCHWARTZENBERGER,

Appellant,

NO. ADV-92-833

-VS-

BIG STONE COLONY,

Respondent.

.....

O R D E R

The respondent, Big Stone Colony, Inc., has moved the Court for an order dismissing the above action and for an award of attorney's fees. The respondent's motion was supported by brief. The petitioners did not file a brief in opposition. The Court heard oral argument on this matter on December 16, 1992. Upon consideration of the motion, brief, arguments and good cause appearing:

IT IS HEREBY ORDERED that the Petition of Karen Schwartzenberger is dismissed with prejudice and that the Petition of Richard H. Knaup and Karen Peterson Knaup is dismissed with prejudice.

Big Stone Colony has requested an award of attorney's fees pursuant to § 85-2-125 MCA. Big Stone Colony is the prevailing party and is entitled to attorney's fees pursuant to the statute.

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Dennis Tighe, attorney for Big Stone Colony, testified about the amount and character of services rendered, the labor, time and trouble involved and the reasonableness of the award of attorney's fees. The Court finds that an attorney's fee award of \$1,000.00 is reasonable.

WHEREFORE, IT IS HEREBY ORDERED that judgment be entered in favor of Big Stone Colony and against Karen Schwartzenger and Richard Knaup and Karen Knaup, jointly and severally, for the sum of \$1,000.00 plus court costs of \$105.00.

DATED this 30<sup>th</sup> day of December, 1992.

THOMAS M. MCKITTRICK

DISTRICT COURT JUDGE

RECEIVED

JAN 06 1993

MONT. DEPT. of NATURAL  
RESOURCES & CONSERVATION

DENNIS TIGHE  
CURE, BORER & DAVIS, P.C.  
300 Central Avenue, Suite 320  
P.O. Box 2103  
Great Falls, Montana 59403-2103  
Telephone: (406) 761-5243  
Attorneys for Respondent

MONTANA EIGHTH JUDICIAL DISTRICT COURT, CASCADE COUNTY

.....

KAREN SCHWARTZENBERGER,

Appellant,

NO. ADV-92-833

-vs-

BIG STONE COLONY,

Respondent.

.....

P78511-3419J

NOTICE OF ENTRY OF JUDGMENT

TO: KAREN SCHWARTZENBERGER and KAREN AND RICHARD KNAUP:

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that Judgment has been entered in favor of Big Stone Colony, Inc. and against Karen Schwartzenberger and Karen Peterson Knaup and Richard H. Knaup. Attached hereto is a true and correct copy of the Order directing entry of judgment.

DATED this 5th day of January, 1993.

CURE, BORER & DAVIS, P.C.

BY DENNIS TIGHE

DENNIS TIGHE  
P.O. Box 2103  
Great Falls, Montana 59403-2103  
Attorneys for Big Stone Colony

CASE # 78511

Karen Schwartzenger  
P.O. Box 129  
Sand Coulee, Montana 59472

Don MacIntyre  
Chief Legal Counsel  
Department of Natural Resources  
and Conservation  
1520 East Sixth Avenue  
Helena, Montana 59620

Karen and Richard Knaup  
263 Cottonwood Coulee  
Stockett, Montana 59480

**CERTIFICATION OF SERVICE OF MAIL**

I hereby certify that the foregoing was duly served upon  
the respective attorneys for each of the parties entitled  
to service by depositing a copy in the United States  
mail, prepaid, addressed to each at the last known ad-  
dress as shown on this or the following page on the  
5th day of January, 1973.

CURE, BORER & DAVIS

BY DENNIS TIGHE  
P.O. BOX 2103  
Great Falls, Montana 59403



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FEB 17 1993

MONT. DEPT. of NATURAL  
RESOURCES & CONSERVATION

MONTANA EIGHTH JUDICIAL DISTRICT COURT  
CASCADE COUNTY

RE: DISMISSAL &

JUDGEMENT ORDER

P78511-g41QJ

NO. ADV-92-833

\*\*\*\*\*

In the matter of judgement by Montana Eighth Judicial District Court, Cascade County, Montana, by the Honorable Thomas M. McKittrick, ordering dismissal of the aforementioned action in favor of respondents, Big Stone Colony, which dismisses Petitioners Karen Schwartzenberger's and Richard and Karen Knaup's complaints, and awarding attorney's fees to Respondent, the Appellants respectfully solicit your reconsideration by means of this "pro se" action, and regard it imperative to the prevalence of justice that the following be incorporated into the court's final decision.

Pursuant to the above action, parties Schwartzenberger and Knaup complied with due process as specified in the Montana Code in their (with others) quest to protect their respective water rights as relate to the application for Beneficial Water Use Permit No. 78511-g41QJ by Big Stone Colony. Initial advice from the Department of Natural Resources and Conservation assured the original opponents of the permit that laws governing water rights were specifically enacted in order to facilitate the individual constituent's protection

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of rights without the necessity of hiring legal counsel.

Schwartzzenberger and Knaup, and others, conscientiously and timely complied with all requirements as set forth by the pre-hearing and hearing processes, overseen by the Department of Natural Resources and Conservation.

The consensus among the opponents in the issue of granting water right No. 78511-g41QJ dictated that hiring an attorney was cost-prohibitive, and the opponents attempted to exercise their rights independently. Our efforts culminated in the granting by the DNRC of the irrigation water use permit, despite voluminous opposition.

Principle and conviction enduced opponents Knaup and Schwartzzenberger to pursue their rights as concerned property owners and citizens of the State of Montana.

The Montana Code defining the process by which one may appeal a government agency's decision was provided to the "appellants" by a member of the DNRC legal department. Albeit from a lay person's point of view, Schwartzzenberger and Knaup ensued to interpret the Code to their utmost abilities, and filed an appeal August 31, 1992 in Eighth Judicial District Court, Cascade County.

By this action the appellants hoped to bring to the attention of the Court the miscarriage of justice which they felt had transpired by the granting by the DNRC of the permit

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and whose agency testified in behalf of the water right permit applicant. Correspondence from the DNRC assured them that the court had been provided with all pertinent documents.

Subsequent to this action, the "appellants" received notice from representatives of counsel for the DNRC and Big Stone Colony that Schwartzenger and Knaup had "failed to properly serve the petition for judicial review", "failed to adhere to the basic rules related to service", and simply "attempted" to appeal a final decision by the DNRC. By counsels' definition, the motions by Schwartzenger and Knaup were not "appeals" at all, giving them grounds for dismissal.

In contradiction, counsel Tighe claims that Knaup and Schwartzenger are liable for attorney's fees and costs incurred by Big Stone Colony in accordance with Section 85-2-125 MCA:

"If a final decision of the department on an application for a permit is APPEALED to the district court, the district court shall award the prevailing party reasonable attorney's fees."

How does this statute apply when, according to arguments and briefs presented by the DNRC and Big Stone Colony's counsel, an APPEAL was not duly presented? What an irony exists in the interpretation of a law mandating that a citizen unable to afford hiring legal counsel in his own behalf is suddenly strapped with a burden of paying another party's

**CASE # 78511**

legal costs which he did not enlist or to which he did not subscribe!

Written material was mailed to parties Schwartzengerger and Knaup containing information proposing a hearing and motion to dismiss in Eighth Judicial District Court. It is impossible to ascertain the exact date the parties were actually in receipt of this correspondence, due to the irregularity of mail delivery in rural areas, and due to the lack of the use of certified or registered mail in its delivery. The notices proposed a hearing on December 16, 1992, at 1:30 PM, "or as soon thereafter as counsel can be heard". Is this to mean possibly December 17th, or later? This date was neither confirmed nor acknowledged by any participating party. Keeping in mind that it was imperative that a impartial hearing take place, allowing adequate time for the rendering of a decision, prior to April of 1993, "appellants" did not consciously relinquish their right to an appeal.

In conclusion, we strongly object to the Court's order to dismiss and its award of attorney's fees. This objection is based on our conviction that our government, of the people, by the people, and for the people, will prevail, with justice for all, and that ordinary citizens should not be intimidated by legal jargon, e.g., use of the word "fatal" in describing our attempts at appealing the agency decision with which we disagreed, into refraining from exercising their rights as

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outlined by our duly elected officials—our public servants  
and recipients of salaries derived from our labors!

Your utmost, expedient attention to this matter will be  
greatly appreciated by a vast number of your respectful  
constituents.

DATED this 12<sup>th</sup> day of February, 1993.

*Karen Schwartzenberger*

KAREN SCHWARTZENBERGER  
P.O.Box 129, Sand Coulee, MT

*Karen Knaup*

KAREN KNAUP  
263 Cottonwood Coulee  
Stockett, MT 59480

Dennis Tighe  
Cure, Borer & Davis, P.C.  
300 Central Avenue, Suite 320  
Great Falls, Montana 59403-2103

Don MacIntyre  
Chief Legal Counsel  
Department of Natural Resources  
and Conservation  
1520 East Sixth Avenue  
Helena, Montana 59620

Joe Mazurek, Attorney General  
3rd Floor - Justice Building  
215 North Sanders  
Helena, Montana 59620

**CASE # 78511**

BEFORE THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION	)	
FOR BENEFICIAL WATER USE PERMIT	)	FINAL ORDER
NO. 78511-g41QJ BY BIG STONE	)	
COLONY	)	

\* \* \* \* \*

On April 28, 1992, the Hearing Examiner issued a Proposal for Decision in this matter. The Proposal recommended granting the subject Application. Timely written exceptions were received from Objectors Karen Schwartzenberger and Richard H. and Karen Peterson Knaup. Attorney Orin R. Cure for Big Stone Colony, submitted a timely written response to the exceptions. The Objectors did not request an opportunity to present oral argument on their exceptions.

Objectors Knaups' exception states that the Department failed to chastise the Applicant for not adhering to the terms of Water Use Permit No. 61340-g41QJ and failed to note with clarity that the Applicant's violation was brought to the attention of the Department by a local citizen instead of enforcement action by the Department.

The Proposed Conclusion of Law 5 appropriately characterizes the action of the Department in regard to chastising the Applicant. The penalties do not include denial of this water use permit. The concern has been brought to the attention of DNRC officials that manage water use permits.

Objectors Knaup except to the Hearing Examiner's conclusion that the proposed appropriation will not affect water

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availability to the Objectors. Objectors Knaup assert that the Applicant's testimony based on DNRC Hydrologists' reports is purely speculative due to the limited knowledge of groundwater availability. The Objectors assert that the Applicant has failed to prove "beyond a shadow of a doubt" that their appropriation would not affect water availability to the Objectors.

I have reviewed the record in this matter. I agree with Proposed Conclusion of Law 8 that the hydrogeologic information in the record provides substantial credible evidence the proposed appropriation will not adversely affect the water rights of prior appropriators. In this case the DNRC made measurements in surrounding wells during a six day pumping experiment and predicted that drawdown effects would be minimal during seasonal pumping. There was no evidence to the contrary.

Objectors Knaup assert that no provision was made in the proposal to monitor the water usage under the permit nor to admonish any violations of the permit. Rather, the Applicant is "required" to keep accurate records of their appropriated water and supply the DNRC with data.

Item 4 of the Proposed Order does require the Applicant to measure and keep records of water use and submit them to the DNRC on an annual basis. The DNRC is not able to make individual water use readings on water use throughout the state. Readings may be made by the DNRC if a complaint is filed or the DNRC determines that a violation is occurring. The order will be amended to state this DNRC authority.

Objector Schwartzenger asserts in her exception that their static water level is 80 feet higher than when the well was drilled. Finding of Fact 20 states that the static water level was at 515 feet when construction was completed.

Finding of Fact 20 indeed states the static water level was 515 feet below the top of the well casing at the time construction was complete on June 26, 1975. The current static water level is not stated in the Finding. The fact presented in Objector Schwartzenger's prehearing statement that the static water level is higher now than during construction has no effect on the proposed Conclusions of Law and Order.

Objector Schwartzenger excepts because no data was collected from their own Madison aquifer well nor was an attempt made. Fred LaRocque's well which is closest in depth and location to their well received limited attention before Mr. Waren abandoned checking it. Adequate documentation does not exist which would disprove a hydrological connection between Objector's Madison aquifer well and the Applicant's deeper Madison aquifer well.

This argument concerning the adequacy of the data was not raised during cross-examination after presentation of the aquifer test results by Mr. Waren. Based on the record, the Schwartzenger Madison well is hydrologically connected to the Applicant's Madison well but the drawdown is not expected to extend beyond 3,239 feet from the Applicant's well. Objector Schwartzenger's well is outside the radius of influence



according to Proposed Finding of Fact 11. The Hearing Examiner's Finding of Fact 11 accurately reflects the record in this matter.

Objector Schwartzenger asserts in the exception that a single appropriator should not be allowed to make diversion more difficult or unreasonably difficult for other people in general. Guidelines and limitations should now be set as to how much of a burden can be placed by one appropriator on another. This needs to be done before further problems arise.

The Hearing Examiner made an evaluation of the reasonableness of the drawdown effect on other appropriators in Conclusion of Law 8. I agree with the conclusion.

Having given the exceptions full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the Proposal for Decision and incorporates them herein by reference. Based upon the Findings of Fact and Conclusions of Law, all files and records herein, and the exceptions, the Department of Natural Resources and Conservation makes the following:

ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, a Permit is hereby granted for Application for Beneficial Water Use Permit 78511-g41QJ by Big Stone Colony to appropriate 340 gallons per minute up to 79 acre-feet of groundwater by means of a well located in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 15, Township 19 North, Range 4 East, in Cascade

County, for irrigation of 21.6 acres in the NW $\frac{1}{4}$  and 10 acres in the N $\frac{1}{2}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$  of said Section 15. The period of appropriation and use shall be from April 15 through October 15, inclusive of each year. Water will be pumped from the well into a pit with a capacity of 9.00 acre-feet, then pumped from the pit located in the N $\frac{1}{2}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$  of said Section 15 to supply wheel line and hand line sprinklers.

1. This Permit is associated with Permit 61340-g41QJ. The combined flow rate shall not exceed 340 gallons per minute up to 264.01 acre-feet per year.

2. This permit is subject to all prior existing water rights in the source of supply. Further, this permit is subject to any final determination of existing water rights, as provided by Montana law.

3. This permit is subject to Section 85-2-505, MCA, requiring that all wells be constructed so they will not allow water to be wasted, or contaminate other water supplies or sources, and all flowing wells shall be capped or equipped so the flow of the water may be stopped when not being put to beneficial use.

4. This permit is subject to the condition that the Permittee shall install an adequate flow metering device in order to allow the flow rate and volume of water diverted to be recorded. The Permittee shall keep a written record of the flow rate and volume of all waters diverted, including the period of time, and shall submit said records by November 30 of each year

to the Lewistown Water Resources Regional Office, P.O. Box 438, Lewistown, MT 59457. The Permittee shall permit access to Department personnel at all reasonable times to make any inspections or readings that the Department deems appropriate.

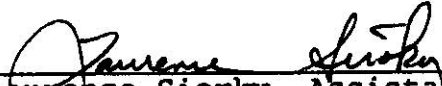
5. Pursuant to Section 85-2-505, MCA, to prevent groundwater contamination, an operational backflow preventer must be installed and maintained by the Appropriator if a chemical or fertilizer distribution system is connected to the well.

6. Upon a change in ownership of all or any portion of this permit, the parties to the transfer shall file with the Department of Natural Resources and Conservation a Water Right Transfer Certificate, Form 608, pursuant to Section 85-2-424, MCA.

#### NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order.

Dated this 30 day of July, 1992.

  
Laurence Siorky, Assistant Administrator  
Department of Natural Resources  
and Conservation  
Water Resources Division  
1520 East 6th Avenue  
Helena, Montana 59620-2301  
(406) 444-6816

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address or addresses this 30<sup>th</sup> day of July, 1992, as follows:

Big Stone Colony  
P.O. Box 70  
Sand Coulee, MT 59472

Frank B. & Paula J. Grieve  
Star Rt Box 63  
Sand Coulee, MT 59472

Mark D. & Lyla L. Young  
P.O. Box 116  
Sand Coulee, MT 59472

David & Karen Carlson  
Star Rt Box 64  
Sand Coulee, MT 59472

Lyle Kuebler & Wanda Smith  
P.O. Box 12  
Sand Coulee, MT 59472

Alvin & Kenneth Jarvi  
& Don A. Labar  
Church, Harris, Johnson &  
Williams  
P.O. Box 1645  
Great Falls, MT 59403

Britt B. & Cynthia J. Davis  
P.O. Box 6415  
Great Falls, MT 59406

Loretta J. & John M. Pejko  
Box 60-A Star Rt  
Sand Coulee, MT 59472

Ronald E. & Noreen Udall  
RR 2153 #50 Greenridge Ln  
Great Falls, MT 59405

Mike & Edith Kavulla  
Star Rt Box 14  
Sand Coulee, MT 59472

Garold Schwartzenger  
Karen Schwartzenger  
P.O. Box 129  
Sand Coulee, MT 59472

Jimmy R. & Carla J. Workman  
124 Red Butte Ln  
Sand Coulee, MT 59472

Norman & Margaret Young  
147 Red Butte Ln  
Sand Coulee, MT 59472

Louis J. Udall  
817 23 St North  
Great Falls, MT 59401

Larry & Marlene McEwen  
125 Luxor Ln  
Star Rt Box 10A  
Sand Coulee, MT 59472

Jimmy W. Rogers  
Star Rt Box 8  
Sand Coulee, MT 59472

Justin E. Berti  
Florentina M. Berti  
#73 Greenridge Ln  
Great Falls, MT 59405

Sand Coulee Water Users Assoc  
P.O. Box 97  
Sand Coulee, MT 59472

Mark & Gloria Clark  
249 Goon Hill Rd  
Sand Coulee, MT 59472

Richard H. Knaup  
Karen Peterson Knaup  
263 Cottonwood Coulee Rd  
Stockett, MT 59480

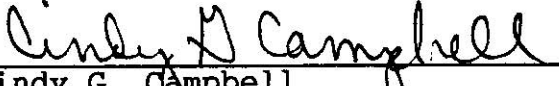
Ronald Dale Scott  
P.O. Box 72  
Sand Coulee, MT 59472

Vivian A. Lighthizer,  
Hearing Examiner  
Department of Natural  
Resources & Conservation  
1520 E. 6th Ave.  
Helena, MT 59620-2301

Edward Borer  
Cure, Borer & Davis, P.C.  
P.O. Box 2103  
Great Falls, MT 59403-2103

Sam Rodriguez, Manager  
Lewistown Water Resources  
Regional Office  
P.O. Box 438  
Lewistown, MT 59457  
(via electronic mail)

Kirk Waren, Hydrogeologist  
Department of Natural  
Resources & Conservation  
1520 E. 6th Ave  
Helena, MT 59624-2301

  
Cindy G. Campbell  
Hearings Unit Legal Secretary

BEFORE THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION     )  
FOR BENEFICIAL WATER USE PERMIT     )     PROPOSAL FOR DECISION  
NO. 78511-g41QJ BY BIG STONE        )  
COLONY                                    )

\* \* \* \* \*

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on March 17, 1992, in Great Falls, Montana, to determine whether a Beneficial Water Use Permit should be granted to the Big Stone Colony for the above-entitled Application under the criteria set forth in § 85-2-311(1) and (4), MCA.

APPEARANCES

Applicant Big Stone Colony appeared at the hearing by and through Andrew J. Wurz and Jacob A. Wurz and its counsel Edward W. Borer.

Objectors Frank B. and Paula J. Grieve appeared at the hearing in person and by and through spokesman, Britt B. Davis.

Objectors Mark D. and Lyla L. Young appeared at the hearing in person and by and through spokesman, Britt B. Davis.

Objectors Garold and Karen Schwartzenger appeared at the hearing by and through Karen Schwartzenger and spokesman, Britt B. Davis.

Objectors Norman and Margaret Young appeared at the hearing in person and by and through spokesman, Britt B. Davis.

Objectors Alvin and Kenneth Jarvi appeared at the hearing by

**CASE # 78511**

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**AUG 28 1992**

and through Alvin Jarvi and counsel Don A. LaBar.

Objectors Britt B. and Cynthia J. Davis appeared at the hearing pro se.

Objectors Loretta J. and John M. Pejko appeared at the hearing in person and by and through spokesman, Britt B. Davis.

Objectors Ronald E. and Noreen Udall appeared at the hearing in person and by and through spokesman, Britt B. Davis.

Objectors Mike and Edith Kavulla appeared at the hearing in person and by and through spokesman, Britt B. Davis.

Objectors Richard H. and Karen Peterson Knaup appeared at the hearing by and through Karen Peterson Knaup and spokesman, Britt B. Davis.

Objectors Larry and Marlene McEwen appeared at the hearing in person and by and through spokesman, Britt B. Davis.

Objectors Sand Coulee Water Users Association appeared at the hearing by and through spokesman, Britt B. Davis.

Objectors Mark and Gloria Clark appeared at the hearing in person and by and through spokesman, Britt B. Davis.

Objectors Jimmy R. and Carla J. Workman, David and Karen Carlson, Lyle Kuebler and Wanda Smith, Ronald Dale Scott, Louis Udall, Justin E. and Florentina M. Berti and Jimmy Rogers appeared by and through spokesman, Britt B. Davis.

William Tamietti, Jr., well owner, appeared as a witness for the Objectors.

Duane Knox, well owner, appeared as a witness for the Objectors.

Kirk Waren, Hydrogeologist with the Department of Natural Resources and Conservation (Department), appeared at the hearing as an expert witness.

Sam Rodriguez, Manager of the Department's Lewistown Water Resources Regional Office, appeared at the hearing.

Scott Irvin, Water Rights Specialist with the Department's Lewistown Water Resources Regional Office, appeared at the hearing.

William Uthman and Marshall Corbett, Hydrogeologists with the Department, attended the hearing as observers.

#### EXHIBITS

Applicant's Exhibit 1 is a report prepared by Kirk Waren on January 23, 1992, concerning Big Stone Colony's Application for Beneficial Water Use Permit 78511-g41QJ.

Applicant's Exhibit 2 is a letter, dated September 1991, addressed to objectors by Scott Irvin explaining the instant Application.

Applicant's Exhibit 3 is the Notice to Water Users published in the Great Falls Tribune on August 7, 1991.

Applicant's Exhibit 4 is a letter dated June 12, 1991, to Richard Knaup from Sterling Sundheim concerning Mr. Knaup's well complaint.

Applicant's Exhibit 5 consists of eight pages and is a report from Kirk Waren to Sterling Sundheim dated May 31, 1991, addressing the complaint filed by Richard Knaup.

Applicant's Exhibit 6 consists of four pages. The first



page is a plat map showing the location of Applicant's well (Frantzich 4-15). The second page is a map showing the location of wells and springs in the area of Applicant's well. The third page is a map of the study area showing Applicant's well and cross section locations. The fourth page is a map of the irrigated acreage permitted by Permit 61340-g41QJ and the proposed 31 acres of irrigation.

Applicant's Exhibit 7 is a copy of Permit to Appropriate Water 61340-g41QJ.

Applicant's Exhibit 8 consists of three pages. The first page is a Completion Report filed with the Montana Board of Oil and Gas Conservation by the Anschutz Corporation. The second page lists the formations encountered during the drilling of Applicant's well. The third page is the Drilling and Geologic Prognosis.

All of Applicant's exhibits were accepted into the record without objection.

Objectors' Exhibit 1 consists of nine pages. The first page is a water quality analysis performed by the Montana Bureau of Mines and Geology for Bill Tamietti. The second page is a Notice of Completion of Groundwater Appropriation by Means of a Well for Mr. Tamietti's well. The third and fourth pages are a letter to William J. and Patricia Tamietti, Jr. from Laurence Siroky. The fifth and sixth pages are copies of a Notice of Completion of Ground-Water Development. The seventh page is a copy of a Certificate of Water Right held by William J. and Patricia

Tamietti, Jr. The eighth page contains information of the work performed on Mr. Tamietti's well and the water level differences of 21 feet. The ninth page is a copy of an Acknowledgment of Receipt of Notice of Ground-Water Completion issued by the Department to William J. Tamietti, Jr. and Patricia Tamietti.

Applicant objected to the inclusion of this exhibit into the record on the basis that Mr. Tamietti was not an objector, had not responded to discovery request, and Applicant was unable to prepare for Tamietti's testimony and exhibit.

Karen Schwartzenger had listed Mr. Tamietti as a witness and disclosed the nature of his testimony and exhibit in her response to Applicant's demand for discovery. The objection was overruled and the exhibit was accepted into the record.

Objectors' Exhibit 2 consists of seven photographs taken by Karen Peterson Knaup. Three of the photographs were taken on March 10, 1986, and show water in a pond or ponds. Four pictures were taken on March 10, 1992, that show the location of the pond or ponds now dry.

Applicant objected to the inclusion of this Exhibit into the record because the exhibit had not been disclosed during discovery. Ms. Peterson Knaup stated that it was disclosed in her response to Applicant's interrogatory. In her response to Interrogatory No. 24, Ms. Peterson Knaup did indeed list photographs illustrating water levels before and after Applicant's irrigation diversion. The objection was overruled and the exhibit was accepted into the record.

The Department file was made available for review by all parties who had no objection to any part of it; therefore, the Department file is accepted into the record in its entirety.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following:

FINDINGS OF FACT

1. Section 85-2-302, MCA, states in relevant part, "Except as otherwise provided in (1) through (3) of 85-2-306, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or distribution works therefor except by applying for and receiving a permit from the department."

2. Big Stone Colony duly filed the above-entitled Application with the Department on June 25, 1991. (Department file.)

3. Pertinent portions of the Application were published in the Great Falls Tribune on August 7, 1991. Additionally the Department served notice by first-class mail on individuals and public agencies which the Department determined might be interested in or affected by the Application.

Forty-eight timely objections to the proposed project were received by the Department. (Department file.)

4. Applicant's well is completed in the Lodgepole Formation of the Madison Group at a depth of approximately 1,400 feet. The well was originally completed on January 20, 1985, at a depth of 2374 feet by The Anschutz Corporation as an exploratory oil and

gas well. The casing was set to a depth of 1338 feet without perforations. The well was sealed from 2315 feet to 2165 feet and from 1757 feet to 1607 feet by The Anschutz Corporation and released to Big Stone Colony as a fresh water well. (Department records, Department files, and testimony of Andrew J. Wurz.)

5. Permit 61340-g41QJ was issued to Big Stone Colony on May 28, 1986, to appropriate 500 gallons per minute (gpm) up to 195.01 acre-feet of groundwater per year for irrigation of 68 acres, up to 10.00 acre-feet per year for domestic use and up to 28.61 acre-feet per year for stock water. On June 25, 1991, Scott Irvin field verified the project authorized by the Permit. At that time, Big Stone Colony was appropriating 340 gpm up to 235.40 acre-feet of water per year irrigating 99.6 acres and 28.61 acre-feet per year for stock water. There had been no domestic use. The volume of water being used for irrigation exceeded the permitted volume by 79 acre-feet per year. The irrigated acreage exceeded the permitted acreage by 31.6 acres. The water was being pumped from the well into a pit; then from the pit to the wheel line and hand line sprinklers. The pit was not included as part of the delivery system for Permit 61340-g41QJ. Applicants filed the instant Application to bring the excess water use and the excess irrigated acreage into compliance with the Water Use Act. (Department file and testimony of Andrew J. Wurz and Scott Irvin.)

6. Applicant seeks to appropriate 340 gallons per minute (gpm) up to 79 acre-feet of groundwater by means of a well

located in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 15 for irrigation of 21.6 acres in the NW $\frac{1}{4}$  and 10 acres in the N $\frac{1}{2}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 15, Township 19 North, Range 4 East, in Cascade County.<sup>1</sup> The proposed period of appropriation and use is from April 15 through October 15, inclusive of each year. Applicant proposes to pump the water from the well into a pit located in the N $\frac{1}{2}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 15 with a capacity of 9.00 acre-feet.<sup>2</sup> The water would then be pumped from the pit to supply wheel line and hand line sprinklers. (Testimony of Andrew J. Wurz and Department file.)

7. Applicant owns the proposed place of use. (Department file and testimony of Andrew J. Wurz.)

8. Applicant began irrigating the additional 31.6 acres on April 25, 1988. It has been irrigated as needed from that time. It was last irrigated on April 26, 1991. The alfalfa stand on this acreage was not very good so it was worked down and has not been irrigated since that time. (Testimony of Andrew Wurz.)

9. In the area surrounding Applicant's irrigation well, the Kootenai Formation is exposed at the surface in the higher elevations. The upper portion of the Kootenai Formation consists of clay beds while the lower portion is mostly sandstone. The Morrison shale which consists of 100 to 200 feet of grey shale

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<sup>1</sup>Unless otherwise specified, all land descriptions in this Proposal are located in Township 19 North, Range 4 East, Cascade County.

<sup>2</sup>Although the Application stated the capacity of the reservoir is 5.2 acre-feet, actual pumping of water into the pond by Applicant at the request of the Department, proved the capacity of the pond is approximately 9.00 acre-feet.

with interbedded sandstones and coal beds lies under the Kootenai Formation. The Madison Group consisting of the Sun River Dolomite, the Mission Canyon Limestone, and the Lodgepole Limestone lies under the Morrison Formation. In the Tracy area, the Swift Formation is present between the Morrison Formation and the Madison Group.

In the area of Applicant's well the water table lies below the top of the Madison Limestone at a depth of approximately 400 to 500 feet. At a lesser depth, perched aquifers are formed in the Kootenai Formation. The underlying Morrison Formation largely precludes downward movement of groundwater. Therefore the Kootenai Formation forms a shallow groundwater system that is separate from the Madison Formation aquifer. The Kootenai aquifer receives recharge locally from precipitation and possibly other surface water sources. Shallow wells 30 feet deep encounter water. Deeper static water levels occur in deeper wells. It is very likely that shale layers separate portions of the aquifer and facilitate storage of water at various depths. Because of the downward gradient, groundwater in this perched system is expected to move downward and laterally rather than upward in the subsurface. Many springs in the vicinity of Spring Coulee discharge from the perched aquifers of the Kootenai Formation and Morrison Shale. The flow of these springs would be expected to decline during extended drought periods such as this area has experienced in the last several years, since the sources of recharge would be limited. (Applicant's Exhibit 1 and

testimony of Kirk Waren.)

10. Precipitation which falls on the outcrop area of the Madison Formation in the Little Belt Mountains south of the Stockett and Sand Coulee area infiltrates down through the unsaturated zone of the Madison Formation to the water table that slopes from the mountains toward Great Falls, in a northerly direction. The best known discharge point of the Madison aquifer is Giant Springs just east of Great Falls. Approximately 300 cubic feet per second (cfs) of groundwater issue from large springs near and in the Missouri River. (Testimony of Kirk Waren.)

Between Tracy and Great Falls, the Madison aquifer may develop upward vertical leakance and discharge to overlying aquifers and to the pre-glacial Missouri River channel southwest of Great Falls. Available data from the Madison, Swift, and Kootenai aquifers is often similar suggesting a high degree of inter-aquifer connectivity in this area.

In the area north of Sand Coulee, the Madison Group aquifer is in a confined condition, i.e., water in the aquifer is under pressure, and if a well is completed in the aquifer, water in the well will rise to a point above the top of the formation. The water is held under pressure by the overlying Morrison Shale which forms a barrier that precludes the upward movement and release of groundwater from the Madison Formation.

In the area of the Applicant's well, the Madison aquifer is unconfined. Below the water table, the limestone is saturated

and all voids in the aquifer are filled with water. Above the water table, the limestone is generally unsaturated and voids are filled with air and varying amounts of moisture. The unsaturated zone extends upward to at least the base of the less permeable Morrison Shale that overlies the limestone. The withdrawal of water from the Madison Formation by Applicant's well cannot affect the water levels in the upper aquifers by somehow pulling more water down. As long as there is an unsaturated zone between aquifers, withdrawals from a lower aquifer cannot influence the water level in upper aquifers. (Testimony of Kirk Warren and Applicant's Exhibit 1.)

11. A pumping experiment was conducted in November of 1991, beginning at 2:15 p.m. on November 15 and ending at 2:21 p.m. on November 21. At the Department's request, Applicant's irrigation well was pumped for six days and six minutes or 144 hours and six minutes until its retention pond was filled. The Department monitored select wells that would demonstrate whether the pumpage from the Big Stone irrigation well would impact aquifers in which Objectors wells were completed. Groundwater levels in most of these wells were measured periodically before, during, and after the six-day period Applicant's well was pumped. Applicant's irrigation well was not monitored because the measuring tape could not be successfully placed in the well. However, the static water level was reported to be 430 feet below ground surface in the spring of 1991. There were no measurable water level changes that could be attributed to the pumping of



Applicant's well.

After six days of pumping, most of the drawdown has occurred and only a very slow spreading of the cone of depression would occur. If an impact is not evident after six days, any impact, even after 60 days, is going to be inconsequential.

The results of the pumping experiment support estimations which indicate that, in the worst case scenario, all drawdown effects of pumping the irrigation well at 340 gpm for 52.6 days would extend no further than 3,239 feet from the irrigation well. Drawdown at 2,100 feet, again in the worst case scenario, would be less than five feet. The nearest objector's well that is completed in the Madison Group is Objectors Knaup's deep house well which lies approximately 3,000 feet from Applicant's well. (Testimony of Kirk Warren and Applicant's Exhibit 1.)

12. The well logs for the James Scott, Grieve, Luoma, Ronald Udall, and Tracy Water Users Corporation wells describe a rusty broken sandstone or oxidized white sandstone at the bases of these wells. This has been interpreted to be the Swift Formation. It has been suggested that the Swift and Madison aquifer in this area may act as a single unit. Therefore, there may be a hydrologic connection between these wells and any other Madison wells, such as Applicant's well. However, during the pumping experiment, the Scott, Ronald Udall, and Luoma wells were monitored and the small changes measured were due to changes in the barometric pressure. The Grieve well was also monitored and showed the well is slow to recover after it has been pumped and

has a relatively low capacity to deliver water.

13. In the area where the Madison Group is an unconfined aquifer, there are numerous wells that do not completely penetrate the Morrison Shale. There is also one well that is completed in the alluvium of a coulee (Harvey Laroque's well) and another (the Pejkos' well) is completed either in the alluvium of a coulee or the top of the Kootenai Formation. These wells cannot be affected by pumping of Applicant's well. These wells include, among others, Knaup's shallow wells, the Clark well, the shallow Schwartzenberger well, both Davis wells, the Sand Coulee Water Users Association's wells and any springs underlain by an unsaturated zone at the top of the Madison Group. During the pumping experiment, Knaup's shallow well, the Davis wells, Sand Coulee Water Users Association well, Pejko's well, the Harvey Laroque well, the Smith well and Clark's well were monitored. All had very little change in the static water level with the exception of the Clark well which showed erratic fluctuations. It appears there is a problem with the Clark well that is related to the well capacity.

Two wells completed in the Madison Formation were monitored during the pumping experiment. The Knaup house well showed a small fluctuation of .78 of a foot. The Chartier-Johnson well showed a small fluctuation of .58 of a foot. (Testimony of Kirk Warren and Applicant's Exhibit 1.)

14. Objectors Grieve have an exempt water right for a well located in the SE $\frac{1}{4}$  of Section 6, Township 19 North, Range 5 East.

This well which yielded 10 gpm was completed at a depth of 115 feet in June of 1962 for domestic use. In August of 1978, the well was deepened to a depth of 210 feet and produced 30 gpm. In December of 1991, a decrease in volume became evident and progressively worsened to the point that only one tap could be used at a time. The well started pumping air and sediment. Objectors Grieve have contacted a well driller to deepen the well a third time. (Testimony of Frank Grieve.)

15. Duane Knox has a well approximately three and one-half miles from Applicant's well. This well was completed at a depth of 344 feet in April of 1986. The static water level was 118. The pumping level was 221 feet. In September of 1989, the pump needed repair and had to be pulled. At that time, the static water level was 167 feet. In March of 1992, the static water level was 193 feet. (Testimony of Duane Knox.)

16. Objectors Alvin and Kenneth Jarvi have a spring approximately one and one-half miles in a northwesterly direction from Applicant's well. They have a stock water well approximately 300 feet deep located two and one-half miles in a southeasterly direction from Applicant's well. Alvin Jarvi does not know if the Jarvi's sources have been affected by Applicant's well. The Jarvis have no objection to the beneficial use of water by the Applicant provided that, as a condition to the permit, if issued, there would be ten more years of testing. Jarvis do not object to Applicant using the well to irrigate the 31.6 acres during that testing period. Alvin Jarvi has noticed a

reduction in surface flow but does not know if it is due to the drought or use of water from the lower formations. (Testimony of Alvin Jarvi.)

17. William Tamietti, Jr. has a well 3.8 miles from Applicant's well. The well was completed at a depth of 228 feet in 1966. The pump was set at 224 feet. In 1980 the static water level was 180 feet. In 1989, Mr. Tamietti's well went dry. The well was deepened to 315 feet. Now the static water level is 200 feet and the pump is still set at 224 feet. There was a spring behind Mr. Tamietti's house that went dry in recent years and the creek in front of his house that sometimes flowed has not flowed for six years. (Testimony of William Tamietti, Jr. and Objectors' Exhibit 1.)

18. Objectors Mark and Lyla Young hold Certificate of Water Right 18957-g41QJ for a developed spring located in the NE $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 34. The spring had been a reliable spring since the time it was developed in 1974 until it went dry. The Youngs also hold Certificate of Water Right 66890-g41QJ for 4.00 gpm up to 3.20 acre-feet of water per year for stock and domestic use from a well which was drilled to replace the aforementioned spring. The well was completed at a depth of 270 feet on November 23, 1987. (Department records and file and testimony of Mark Young.)

19. Objectors Richard and Karen Peterson Knaup hold Certificate of Water Right 66898-g41QJ with a priority date of December 4, 1987, to appropriate 22 gpm up to 4.90 acre-feet of groundwater per year for domestic and stock water purposes by

means of a well located in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 16. This well was completed at a depth of 400 feet on October 28, 1987. The static water level in the well was 315 feet.

Objectors Knaup have filed Statement of Claim W200799-41QJ with the Water Court claiming 30 gpm up to 10 acre-feet of water per year for domestic use from a spring located in Section 16. The claimed priority date is May 1, 1946. They have also filed Statement of Claim W200798-41QJ claiming 500 gpm up to 100 acre-feet of water per year for stock from a spring located in Section 16. The claimed priority date is May 1, 1946.

Statements of Claim W209455-41QJ, W209456-41QJ, W209457-41QJ, and 209458-41QJ were transferred to the Knaups in 1985 from Louis M. and Dorothy D. Hendrickson. Statement of Claim W209455-41QJ is for 3.00 gpm up to 28.56 acre-feet of water per year for stock water from a well 403 feet deep located in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 9. The claimed priority date is February 5, 1962. Statement of Claim W209456-41QJ claims 4.00 gpm up to 28.56 acre-feet per year for stock water from a developed spring located in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 9. The claimed priority date is 1960. Statement of Claim W209457-41QJ is for 7.34 acre-feet of water per year from runoff and a spring located in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 9. The claimed priority date is July 1, 1961. Statement of Claim W209458-41QJ claims 3.00 gpm up to 1.8 acre-feet of water per year for domestic use from a spring located in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 9. The claimed priority date is February 5, 1962.

Objectors Knaup have noticed a marked decline in their water sources since 1987. The Knaups do not wish to deny any individual the right to adequate water for stock or domestic use. They are, however, opposed to diversion of groundwater for irrigation in an area which is traditionally dry land farms. (Testimony of Karen Peterson Knaup and Department records.)

20. Objectors Garold and Karen Schwartzenger hold Certificate of Water Right 6122-g41QJ with a priority date of August 4, 1975, for 5.00 gpm of groundwater for stock and domestic use from a well located in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 23. The well was completed at a depth of 586 feet on June 26, 1975. The static water level was 515 feet. Schwartzengers also hold Certificate of Water Right 17926-g41QJ with a priority date of March 14, 1978, for 15.00 gpm up to 1.5 acre-feet per year of groundwater for stock, domestic, and irrigation of 24 acres. Objectors Schwartzenger are concerned about the lack of information on the Madison aquifer and believe more testing should be done. (Department records and testimony of Karen Schwartzenger.)

21. Statements of Claim W209558-41QJ and W209560-41QJ have been transferred to Objectors Jimmy and Carla Workman. Statement of Claim W209558-41QJ claims 6.00 gpm of the waters of a spring located in SW $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 27 for domestic use. The claimed priority date is 1918. Statement of Claim W209560-41QJ claims 5.00 gpm of the waters of a spring located in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 27 for domestic use. The claimed priority date is 1961.

The Workmans believe there are no unappropriated waters in the source and that existing springs and underground water sources have been depleted by Applicant's prior use. (Department records and file.)

22. Objectors Norman and Margaret Young have filed Statements of Claim W209555-41QJ, W209556-41QJ, and W209559-41QJ, as well as several others. Claim W209555-41QJ claims 5.5 gpm of water from a well located in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 34 for stock water with a priority date of 1961. Claim W209559-41QJ claims a priority date of 1912 for 70 gpm up to 3.5 acre-feet of water per year from a spring located in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 34 for domestic use. Claim W209556-41QJ claims 4.00 gpm of water from a well located in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 34 for stock water with a priority date of 1920. Norman and Margaret Young believe there are no unappropriated waters in the source and that the existing springs and underground water sources have been depleted by Applicant's prior use. (Department records and file.)

23. Statements of Claim W208702-41QJ and W208703-41QJ have been transferred to Objectors David and Karen Carlson. Statement of Claim W208702-41QJ claims 30 gpm up to 2.8 of an acre-foot of water from a well located in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 6 for domestic use with a priority date of October 1957. Statement of Claim W208703-41QJ claims 30 gpm up to .12 acre-feet of water per year from a well located in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 6 for stock use with a priority date of October 1, 1957. The Carlsons



believe the amount of water Applicant would use could cause a shortage of water for them. They also believe Applicant's farm was historically a dry land operation and should remain so.

24. Objectors Britt and Cynthia Davis claim an exempt right for a well located in the  $W\frac{1}{2}E\frac{1}{2}$  of Section 27 for domestic use with a priority date of March 7, 1940. (Department file.)

Mr. Davis, on his own behalf and for all the Objectors, does not object to people irrigating the land, or drinking the water, or having all the water they need. His concern is that there is not enough positive information that Applicant is not affecting the Objectors' and witnesses' wells. It would be an odd coincidence, according to Mr. Davis, for springs and wells that have been in use for many years to go dry after Applicant began pumping its irrigation well. Mr. Davis also believes more testing is needed. (Testimony of Britt Davis.)

25. Objectors Loretta and John Pejko hold Certificate of Water Right 28226-g41QJ for 25.00 gpm up to 1.5 acre-feet of water from a well located in the  $SW\frac{1}{4}SE\frac{1}{4}NW\frac{1}{4}$  of Section 12 for domestic use. This well was completed on August 26, 1978, at a depth of 70 feet. The Pejkos have noticed the springs in their area are going completely dry or turning into a mere trickle in the last three or four years. There was a creek in front of their house which was fed by a spring that has completely disappeared. Objectors Pejko believe Applicant is using more than its fair share of water. (Department file.)

26. Objectors Kuebler and Smith have an interest in



Certificate of Water Right 68142-g41QJ for 10 gpm up to 1.5 acre-feet of water from a well located in the SW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 18, Township 19 North, Range 5 East, for domestic use. The well was completed at a depth of 175 feet on March 20, 1988. Ms. Smith and Mr. Kuebler have taken over the loan of Bonnie and Emmett Eller, who hold Certificate of Water Right 68142-g41QJ. Ms. Smith and Mr. Kuebler believe their interests would be adversely affected by the proposed appropriation. (Department file.)

27. Objectors Ronald and Noreen Udall hold Certificate of Water Right 58705-g41QJ for 30.00 gpm up to 1.57 acre-feet of water from a well located in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 36, Township 20 North, Range 4 East, for stock and domestic use. This well was completed at a depth of 266 feet on January 16, 1985. Ronald and Noreen Udall believe the proposed appropriation is too much water to be pumped out of the aquifer. (Department file.)

28. Objectors Larry and Marlene McEwen filed a Notice of Completion of Groundwater Appropriation by Means of Well with the Montana Water Resources Board on April 8, 1968, for 40.00 gpm from a well located in the NW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 18, Township 19 North, Range 5 East. This well was completed to a depth of 162 feet on March 7, 1968. The McEwens believe their well is completed in the same aquifer as Applicant's well; however, the well log indicates otherwise. They believe Applicant's use will deplete the aquifer. (Department file.)

29. Objectors Mike and Edith Kavulla claim an exempt

domestic right for 40.00 gpm from a well located in the SE $\frac{1}{4}$  of Section 18. There is no other information about this well in the record nor is it in the Department's records. The Kavullas believe Applicant's proposed use will interfere with their water supplies. (Department file.)

30. Objector Ronald Dale Scott holds Certificate of Water Right 69447-g41QJ for a well located in the SW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 29, Township 20 North, Range 5 East, for 17.00 gpm up to 1.55 acre-feet of water per year for stock and domestic use. This well was completed at a depth of 235 feet on April 11, 1988. Mr. Scott believes that a well as deep as Applicant's would cause a hardship on everyone in the Sand Coulee area. Most of the wells established in that area, according to Mr. Scott, aren't that deep and only produce around 30 gpm. Objector Scott further believes if the water table were dropped very much at all, it would affect everyone. (Department file.)

31. Jimmy Rogers holds Certificate of Water Right 21589-g41QJ for 20.00 gpm up to .63 acre-feet of water per year for domestic use from a well located in the SW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 31, Township 20 North, Range 4 East. This well was completed at a depth of 250 feet on May 30, 1978. There are numerous families in the vicinity of the Applicant's well that depend on the groundwater for domestic use. Mr. Rogers believes to approve a permit for the instant Application when people are already lowering their pumps because the water table is being lowered, would be irresponsible. (Department file.)

32. Objector Louis Udalls hold Certificate of Water Right 64819-g41QJ for 30.00 gpm up to 1.63 acre-feet of water per year from a well located in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 29, Township 20 North, Range 5 East, for stock and domestic use. This well was completed at a depth of 247 feet on May 3, 1985. Louis Udall has two wells; however, no information was available on one of the wells. One of Mr. Udall's wells went dry due to declining water levels. Mr. Udall believes Applicant wants to tap the water source for the entire community and divert it to its farm which will leave many wells in the area dry. (Department file.)

33. Justin and Florentina Berti hold Certificate of Water Right 68155-g41QJ for 40 gpm up to 9.15 acre-feet of water per year from a well located in the SE $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 36, Township 20 North, Range 4 East, for domestic, irrigation, and stock water. This well was completed at a depth of 267 feet on May 10, 1987. Objectors Berti's only source of water for their home is this well. They are concerned that the effect of such a large volume well as Applicant proposes would cause a drop in the water table causing severe problems. (Department file.)

34. Sand Coulee Water Users Association (SCWUA) holds Certificate of Water Right 6174-g41QJ for 60 gpm of water per year for municipal use from a well located in the E $\frac{1}{2}$ SE $\frac{1}{4}$  of Section 14. This well was completed at a depth of 210 feet on October 11, 1973. They also hold Permit to Appropriate Water 70692-g41QJ for 45 gpm up to 45.15 acre-feet of water per year from a well located in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 14. There is no

well log in the Department's records for this well. SCWUA would like to see more testing of the aquifer to make sure the water levels in their wells would not be affected. SCWUA also believes domestic use should take priority over irrigation use.  
(Department file.)

35. Objectors Mark and Gloria Clark claim an exempt domestic water right of 5.00 gpm up to 1.5 acre-feet of water per year from a well located in the NW $\frac{1}{4}$  of Section 15. This well was completed at a depth of 190 feet deep in 1948. The Clarks contend they have had a dramatic drop in their domestic water supply since Applicants started using their irrigation well.  
(Department file.)

36. There are no planned uses or developments for which a permit has been issued or for which water has been reserved that would be adversely affected by the proposed appropriation.  
(Department file.)

Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule have been fulfilled, therefore, the matter was properly before the Hearing Examiner. See Finding of Fact 3.
2. The Department has jurisdiction over the subject matter herein, and all the parties hereto.
3. The Department must issue a Beneficial Water Use Permit

if the Applicant proves by substantial credible evidence that the following criteria set forth in § 85-2-311(1) and (4), MCA, are met:

- (a) there are unappropriated waters in the source of supply at the proposed point of diversion:
  - (i) at times when the water can be put to the use proposed by the applicant;
  - (ii) in the amount the applicant seeks to appropriate; and
  - (iii) during the period in which the applicant seeks to appropriate, the amount requested is reasonably available;
- (b) the water rights of a prior appropriator will not be adversely affected;
- (c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;
- (d) the proposed use of water is a beneficial use;
- (e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved; and
- (f) the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

. . . .  
(4) To meet the substantial credible evidence standard in this section, the applicant shall submit independent hydrologic or other evidence, including water supply data, field reports, and other information developed by the department, the U.S. geological survey, or the U.S. soil conservation service and other specific field studies, demonstrating that the criteria are met.

4. The proposed use, irrigation is a beneficial use. Mont. Code Ann. § 85-2-102(2) (1989). Applicant would beneficially use all the water diverted. There is no evidence in the record that Applicant would waste water. See Findings of Fact 6 and 8.

5. Applicant has provided substantial credible evidence

that the proposed means of diversion, construction, and operation of the appropriation works are adequate. See Findings of Fact 4, 5, 6, and 8.

It is true Applicant diverted water from the proposed source and for the proposed purpose prior to filing an application or receiving a permit to do so when they began irrigating the additional 31.6 acres. Although diverting water without a permit is a misdemeanor and criminal sanctions may apply, the penalties authorized do not include denial of a permit. Mont. Code Ann. §§ 85-2-122 and 46-18-212 (1989). The Department has no statutory authority to deny a permit on such grounds. See In re Application No. 52031-s76H by Frost. Furthermore, whether the diversion works were first operated "illegally" is not relevant to how data from that operation serves to satisfy the criteria for issuance of a permit. See In re Application No. 61978-s76LJ by Town.

6. Applicant has possessory interest in the proposed place of use. See Finding of Fact 7.

7. Applicant has provided substantial credible evidence there are unappropriated waters in the source of supply at the proposed point of diversion at times when the water can be put to beneficial use and water is reasonably available in the amount Applicant seeks to appropriate, during the proposed period of appropriation. See Findings of Fact 8, 10, and 11.

8. The hydrogeology information in the record provides substantial credible evidence the proposed appropriation will not

adversely affect the water rights of prior appropriators. See Findings of Fact 9, 10, 11, 12, and 13.

The pumping experiment shows little or no change in Objectors' wells as a result of pumping Applicant's well. See Finding of Fact 11. However, if the wells in the Madison Formation did experience a lowering of the water table, that would not necessarily mean Applicant's well was creating an adverse effect. Applicant's well penetrates the entire thickness of the Madison Group and is drawing water from the bottom. See Finding of Fact 4. Those Objectors who have wells completed in the Madison Formation have penetrated only the top of the aquifer. See Findings of Fact 9, 11, 19, and 20. These wells in comparison with the thickness of the Madison aquifer are shallow wells. The static water level of Objectors Schwartzenberger's was 515 feet and Applicant's well is approximately 1400 feet deep. See Findings of Fact 4 and 20. That means there are 885 feet of water in the Madison aquifer that are largely untapped. To hold that an appropriator is entitled to maintain shallow wells against any subsequent appropriators would be to allow a single appropriator or a limited number of appropriators to control an entire aquifer simply to make their diversion easier. Both case law and statutes prevent such result.

Priority of appropriation does not include the right to prevent changes by later appropriators in the condition of water occurrence, such as the increase or decrease of streamflow or the lowering of a water table, artesian pressure, or water level, if



the prior appropriator can reasonably exercise his water right under the changed conditions. Mont. Code Ann. § 85-2-401(1) (1979).

At his own point of diversion on a natural water course, each diverter must establish some reasonable means of effectuating his diversion. He is not entitled to command the whole of the stream merely to facilitate his taking of the fraction of the whole flow to which he is entitled. Schodde v. Twin Falls Land & Co., 224 U.S. 107, 92 S. Ct. 470, 56 L.Ed 686. This principle applied to diversion of underflow or underground water means that priority of appropriation does not give a right to an inefficient means of diversion, such as a well which reaches such a shallow depth into the available water supply that a shortage would occur to such senior even though diversion by other did not deplete the stream below where there would be an adequate supply for the senior's lawful demand.

Colorado Springs v. Bender, 148 Colo. 458, 366 P.2d 552 (1961) at 555. See also Alamosa-La Jara v. Gould, 674 P.2d 914 (1983); Wayman v. Murray City Corporation, 23 Utah 2d 97, 458 P.2d 861 (1969); Doherty v. Pratt, 34 Nev. 343, 124 P. 574 (1912) In re Application No. 31441-g41R by McAllister; In re Application No. 71133-g41B by Hildreth; In re Application No. 42666-g41F by MacMillan.

The principle that no appropriator should be allowed to "command the source" simply so that he may have a convenient method of diversion, is consistent with the State of Montana's policy of maximizing the beneficial use of water. Mont. Code Ann. § 85-2-101(3) (1973).

There is evidence in the record that water levels have



declined since 1985. See Findings of Fact 14, 15, 16, 17, 18, and 19. The decline of water levels is not in itself an adverse effect. The wells completed in the Kootenai and Morrison Formations in the area of Applicant's well cannot be affected by that well. See Findings of Fact 10 and 13. If the water levels in those wells decline, it would be for reasons other than pumping from Applicant's well.

It is estimated that under the worst case scenario, the drawdown effects would extend no further than 3,239 feet from Applicant's irrigation well. See Finding of Fact 11. All the Objectors' wells with the exception of Knaup, whose Madison Formation well is approximately 3,000 feet from the Applicant's well, and Clark, whose well is completed in the Kootenai Formation, exceed this distance considerably. See Findings of Fact 14, 16, and 18 through 35. Most of these well are completed in the Kootenai or Morrison Formations and could not be affected by Applicant's well; however, the fact that they are located such great distances from Applicant's well provides additional assurance there will be no adverse effect to these wells.

9. The Objectors are not convinced there will be no adverse effect as indicated by the pumping experiment and Mr. Waren's report and requested as a condition of a permit, if issued, that there be more testing. See Findings of Fact 16 and 24. This Hearing Examiner has no authority, in a water right application case, to order the Department to maintain a well monitoring program in the Sand Coulee area for ten years. Section 85-2-

312(1) provides in relevant part, ". . . The department may issue a permit subject to terms, conditions, restrictions, and limitations it considers necessary to satisfy the criteria listed in 85-2-311, and it may issue temporary or seasonal permits . . . ." This means a permit can be conditioned, restricted, or limited, so that the Applicant is required to do certain things to prevent an adverse effect to prior appropriators, to make his means of appropriation, construction, and operation adequate, or to take some action which will satisfy the criteria in § 85-2-311, MCA.

The Objectors could and should monitor their own wells and other groundwater sources. The Applicant will be required to install a measuring device and to keep records of all water diverted from their irrigation well. It may be possible for the Lewistown Water Resources Regional Office to measure certain wells before irrigation season starts, during the irrigation season and after the irrigation season ends.<sup>1</sup> If all of these measurements were sent to the Department for evaluation at the end of each year, they could serve the purpose of a monitoring program.

10. Some of the Objectors stated that domestic use should take priority over irrigation use. See Finding of Fact 34. In Montana, there is no priority of use. Montana's water law is

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<sup>1</sup>The parties involved in this case should contact the Lewistown Water Resources Regional Office to discuss such a proposal.

based upon the Prior Appropriation Doctrine. That is, first in time, first in right. It matters not what the use is as long as the use is beneficial.

11. The proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved. See Finding of Fact 36.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, a Permit is hereby granted for Application for Beneficial Water Use Permit 78511-g41QJ by Big Stone Colony to appropriate 340 gallons per minute up to 79 acre-feet of groundwater by means of a well located in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 15, Township 19 North, Range 4 East, in Cascade County, for irrigation of 21.6 acres in the NW $\frac{1}{4}$  and 10 acres in the N $\frac{1}{2}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$  of said Section 15. The period of appropriation and use shall be from April 15 through October 15, inclusive of each year. Water will be pumped from the well into a pit with a capacity of 9.00 acre-feet, then pumped from the pit located in the N $\frac{1}{2}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$  of said Section 15 to supply wheel line and hand line sprinklers.

1. This Permit is associated with Permit 61340-g41QJ. The combined flow rate shall not exceed 340 gallons per minute up to 264.01 acre-feet per year.

2. This permit is subject to all prior existing water rights in the source of supply. Further, this permit is subject to any final determination of existing water rights, as provided by Montana law.

3. This permit is subject to Section 85-2-505, MCA, requiring that all wells be constructed so they will not allow water to be wasted, or contaminate other water supplies or sources, and all flowing wells shall be capped or equipped so the flow of the water may be stopped when not being put to beneficial use.

4. This permit is subject to the condition that the Permittee shall install an adequate flow metering device in order to allow the flow rate and volume of water diverted to be recorded. The Permittee shall keep a written record of the flow rate and volume of all waters diverted, including the period of time, and shall submit said records by November 30 of each year to the Lewistown Water Resources Regional Office, P.O. Box 438, Lewistown, MT 59457.

5. Pursuant to Section 85-2-505, MCA, to prevent groundwater contamination, an operational backflow preventer must be installed and maintained by the Appropriator if a chemical or fertilizer distribution system is connected to the well.

6. Upon a change in ownership of all or any portion of this permit, the parties to the transfer shall file with the Department of Natural Resources and Conservation a Water Right Transfer Certificate, Form 608, pursuant to Section 85-2-424,


MCA.

NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Parties may file responses to any exception filed by another party within 20 days after service of the exception. However, no new evidence will be considered.

No final decision shall be made until after the expiration of the time period for filing exceptions, and due consideration of timely exceptions, responses, and briefs.

Dated this 28<sup>th</sup> day of April, 1992.

  
Vivian A. Lightizer Hearing Examiner  
Department of Natural Resources  
and Conservation  
1520 East 6th Avenue  
Helena, Montana 59620  
(406) 444-6625

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record at their address or addresses this 28<sup>th</sup> day of April, 1992 as follows:

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Hearings Unit Legal Secretary

**CASE # 78511**